

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

SOURCEGAS DISTRIBUTION LLC,) FORMAL COMPLAINT NO. FC-1325
f/k/a KINDER MORGAN, INC. -)
RETAIL.,)
)
Complainant,)
) ORDER DISMISSING COMPLAINT
v.)
)
PANHANDLE FEEDERS, INC.,)
)
Defendant.) Entered: January 15, 2008

BY THE COMMISSION:

On May 9, 2007, SourceGas Distribution LLC, f/k/a Kinder Morgan, Inc. - Retail (SourceGas) filed a formal complaint against Panhandle Feeders, Inc. (Panhandle) alleging installation of duplicative and redundant natural gas facilities in violation of the State Natural Gas Regulation Act, Neb. Rev. Stat. § 66-1801, et seq. (SNGRA) On June, 18, 2007, Panhandle filed its answer to the formal complaint.

Hearing on this matter took place on November 7, 2007. Douglas Whitefoot, vice president of operations; Scott Emerson, director of transportation business development; and William Meckling, director of regulatory affairs testified on behalf of SourceGas. Chris Melson of Panhandle; Bruce Olson, director of Engineering and technology for Kinder Morgan Interstate Gas Transmission LLC (KMIGT); and Richard Coil of Seminole Energy Services, LLC (Seminole) testified on behalf of Panhandle. Subsequent to the hearing, both parties filed post-hearing briefs.

EVIDENCE

Panhandle is a commercial cattle feeder operation located in Scottsbluff County, Nebraska.¹ SourceGas is a local distribution company (LDC).² KMIGT is an interstate natural gas pipeline.³ The Panhandle property includes a flaker mill, a residence and an office.⁴ SourceGas currently provides natural gas service to Panhandle through facilities which include, but are not limited to three meters, certain valves, and two regulators.⁵ Additionally, gas is delivered from SourceGas

¹ Exhibit 42, ¶ 2.

² Direct Testimony of Douglas Whitefoot, Trans. 17:11-16.

³ Exhibit 42, ¶ 3.

⁴ Exhibit 42, ¶ 4; Whitefoot, 22:8-19.

⁵ Exhibit 42, ¶ 5.

facilities to Panhandle through a customer-owned pipe.⁶ On February 2, 2007, KMITG filed with the Federal Energy Regulatory Commission (FERC) a request for authorization to install and operate a new delivery tap and related facilities to provide natural gas service directly from its interstate pipeline to Panhandle (Bypass Application).⁷ SourceGas filed with FERC a protest, intervention and request for evidentiary hearing related to the KMITG request.⁸ The Bypass Application is currently pending.

OPINION AND FINDINGS

With respect to duplicative natural gas services, the SNGRA contains an expansive prohibition, stating, "Except as otherwise expressly authorized in the State Natural Gas Regulation Act, no person, public or private, shall extend duplicative or redundant natural gas mains or other natural gas services into any area which has existing natural gas utility infrastructure or where a contract has been entered into for the placement of natural gas utility infrastructure."⁹

The threshold issue presented in this matter is whether the Federal Natural Gas Act preempts the Commission's authority to apply the duplicative piping statute to service to Panhandle from KMITG.

The circumstances under which state law is preempted by federal law include, (a) "Congress explicitly may define the extent to which its enactments pre-empt state law"; (b) In the absence of explicit statutory language,... Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law"; and (c) "state law is pre-empted when it actually conflicts with federal law".¹⁰ A state law conflicts with federal law when "it is impossible to comply with both state and federal law" or when "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress".¹¹

The activities of interstate pipelines are generally governed by the Federal Natural Gas Act (Federal Act) which provides,

⁶ Id.

⁷ Exhibit 42 ¶ 6.

⁸ Exhibit 42 ¶ 7.

⁹ Neb. Rev. Stat. § 66-1852(1).

¹⁰ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988).

¹¹ Id. At 300 (citations omitted).

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.¹²

SourceGas in arguing that the Commission is not preempted has relied upon *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951) (Panhandle/Michigan) and *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 322 U.S. 507 (1947) (Panhandle/Indiana). In Panhandle/Michigan, Panhandle, an interstate pipeline, sought to enjoin enforcement of an order by the Michigan Public Service Commission requiring the company to apply for a certificate of public convenience and necessity before it sold natural gas directly to an industrial customer. Similarly, in Panhandle/Indiana, Panhandle sought to enjoin enforcement of an order by the Public Service Commission of Indiana which held that the distribution of Natural Gas in Indiana by Panhandle directly to industrial consumers was subject to the Commission's regulation. Panhandle was providing transportation and was selling natural gas directly to consumers.

Both of these cases are distinguishable from the present matter in that the interstate pipeline was not only transporting natural gas to the end-user but was also selling gas to the end-user. In applying these cases to the present situation, it is important to view them in the proper historical context. Both Panhandle/Michigan and Panhandle/Indiana were decided prior to the unbundling of marketing and transportation in 1992.¹³ Subsequent to the 1992 order, interstate pipelines provide transportation separate from the sale of the commodity itself and are treated separately. In the present case Panhandle will be purchasing its natural gas from Seminole and KMIGT will be

¹² 15 U.S.C. § 717(b).

¹³ See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Docket No. RM91-11-000 and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Docket No. RM87-34-065, FERC Order No. 636 (April 8, 1992).

providing transportation only. Regarding the sale of gas, Seminole is subject to the Commission's jurisdiction as a certified Competitive Natural Gas Provider (CNGP).

The Sixth Circuit has specifically found that bypass transportation of natural gas does not constitute local distribution.¹⁴ The Court, in finding that state regulation of an interstate pipeline providing transportation to an end-user was preempted by the Federal Act, stated:

[W]e believe that in establishing a comprehensive regulatory network, Congress intended to occupy a field which the states could not reach. Similarly, to allow the MPSC to regulate the bypass in this case would obstruct the execution of the complementary relationship between state and federal regulation established by the Act. Were we to permit the MPSC to cancel the FERC's approval of the ... bypass, we would subordinate federal regulatory power to state regulatory power in the complete absence of authority to do so.¹⁵

Similarly, the Tenth Circuit has also addressed federal jurisdiction over a bypass application in which the interstate pipeline was providing transportation only, and specifically distinguished direct retail sales by interstate pipelines from interstate transportation.¹⁶

In *Cascade v. FERC*, the interstate pipeline sought to transport natural gas for hire to an end-user pursuant to out-of-state third party sales. The court stated, "Quite simply, the bypass transactions do not entail the realm of local retail sales that Congress intended to reserve to the states ... The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale."¹⁷

The service to be provided by KMITG to Panhandle constitutes "the transportation of natural gas in interstate commerce" pursuant to the Federal Act. Should the Commission attempt to prohibit the construction of the bypass pursuant to

¹⁴ *Michigan Consolidated Gas Company, et al. v. Panhandle Eastern Pipe Line Co., et al.*, 887 F.2d 1295 (6th Cir. 1989).

¹⁵ *Id.* At 1301.

¹⁶ *Cascade Natural Gas Corp. v. FERC and Washington Utilities and Transportation Commission*, 955 F.2d 1412 (10th Cir. 1992).

¹⁷ *Id.* At 1419.

Neb. Rev. Stat. § 66-1852(1) and FERC approve the construction of the bypass, the state law would "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." Therefore, the Commission finds that it is preempted from applying the Nebraska double-piping statute to the construction of a bypass of a local distribution company by an interstate pipeline to provide interstate transportation of natural gas directly to an end-user.

An examination of the SNGRA appears to further support the contention that bypass under the present circumstances is a matter within the purview of FERC and the Federal Act.

The SNGRA grants the Commission broad authority to regulate natural gas public utilities, stating:

The Commission shall have full power, authority, and jurisdiction to regulate **natural gas public utilities** and may do all things necessary and convenient for the exercise of such power, authority, and jurisdiction. Except as provided in the Nebraska Natural Gas Pipeline Safety Act of 1969, and notwithstanding any other provision of law, such power, authority, and jurisdiction shall extend to, but not be limited to, all matters encompassed within the State Natural Gas Regulation Act and sections 57-1301 to 57-1307.¹⁸

However, by definition, a natural gas public utility does **not** include an interstate pipeline such as KMITG.¹⁹ The legislative history of the double-piping prohibition further indicates that the legislature did not intend the double-piping statute to cover the activity at issue.

Because the Commission has found that it is preempted from applying the double-piping prohibition to the Complaint at issue, there is no need to address any remaining issues with respect to proper party or whether the infrastructure at issue constitutes double-piping under § 66-1852(1).

¹⁸ Neb. Rev. Stat. § 66-1804(1) (emphasis added).

¹⁹ See Neb. Rev. Stat. § 66-1802(8) and (11).

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O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Complaint should be and is hereby dismissed.

MADE AND ENTERED at Lincoln, Nebraska, this 15th day of January, 2008.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Anne C. Boyle
Chair

Gerald F. Vay

Frank E. Landis

Tim Schram

ATTEST:

Michelle R. H. H.
Executive Director

//s// Anne C. Boyle
//s// Frank E. Landis